IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6597 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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HARSHVADAN VITHALDAS PANCHAL

Versus

AHMEDABAD MERCANTILE CO - OPERATIVE BANK LTD.

Appearance:

1. Special Civil Application No. 6597 of 2001

MR KETAN D SHAH for Petitioner No. 1

MR RAVINDRA SHAH for Respondent No. 1

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 07/05/2002

ORAL JUDGEMENT

Rule. Mr.Ravindra R Shah appears and waives service of rule on behalf of respondent. With the consent of parties matter is finally heard today.

2. The present petition is preferred by the petitioner against the order dated 3.7.01 passed by the tribunal whereby the exparte judgment and award passed by the Ld.Nominee is confirmed.

3. The short facts of the case are that the suit being Lavad Suit No.1036/95 was preferred for recovering Rs.5,09,254.52ps by the respondent-Bank against the petitioner. It is the case of the bank that the summons were served. However, the petitioner has denied the said aspect. On 2.4.96 award came to be passed by the Ld.Nominee and the petitioner could not remain present for defending the suit.

4. The petitioner preferred appeal before the Gujarat State Coop.Tribunal (hereinafter referred to as "the tribunal") being Appeal No.264/96 and there was delay in preferring the appeal and an application for condonation of delay was also submitted together with the appeal. The tribunal ultimately heard the application for condonation of delay and while deciding the application for condonation of delay the tribunal touched the matter on merits so far as the justification on the part of the Ld.Nominee to pass exparte order is concerned and ultimately the tribunal has passed the order dated 3.7.01 whereby the said application is rejected and appeal is also dismissed and it is this order of the tribunal which is under challenge in this petition.

5. Mr.K.D.Shah for the petitioners submitted that the tribunal while deciding the application for condonation of delay has not properly considered that whether the delay was sufficiently explained or not and he also submitted that while deciding the application for condonation of delay the tribunal in its order observed that on merits there is no case. However, he submitted that while arriving at the finding on merits the tribunal relied upon the observations made by the Ld.Nominee in exparte award and the material which was produced by the bank before the Nominee. Mr.Shah submitted that opportunity of defending of the suit could not be given to the petitioner and as a result thereof there is exparte award. Mr.Shah submitted that the petitioner to show his bonafides is ready and willing to deposit the amount of Rs.1 lac with the bank and is further ready and willing to bear the costs of the suit before the Nominee, appeal before the tribunal and petition before this court if the matter is remanded to the Nominee for deciding the suit.

6. On behalf of the respondent Bank Mr.Ravindra Shah

submitted that the suit is filed as back as 1995 and he submitted that the award is passed for recovery of a sum of Rs.5,09,254.52 ps with interest and as on today the it is more than Rs.11 lacs to be recovered by the bank from the petitioner. Mr.Shah submitted that the petitioner should be directed to deposit more amount if the matter is remanded to the Nominee for deciding on merits and the Nominee be directed to decide the suit within time bound programme.

7. Considering the rival submissions of the parties, I am of the view that the order passed by the tribunal dated 3.7.01 is though on merits can not be sustained because the tribunal has only taken into consideration the material which was available before the Nominee in the suit proceedings for touching the merits of the suit. Not only that but the tribunal has while deciding the question of condonation of delay has also not considered that the delay can be condoned and the matter could have been decided on merits. Since the tribunal has considered the merits only to the extent that whether the nominee was justified in proceeding with the suit after summons were served to the petitioner or not, I am of the view that while deciding the application for condonation of delay it is open to the tribunal to decide the question on merits also, but, at the same time, in view of the fact that the defence of the petitioner is that the amount of Rs.4 lacs is not given credit, it can be said that there was good defence on the part of the petitioner and if the tribunal finds that there is good defence and delay should be condoned. Perusal of the judgment and award shows that there is no detailed discussion on evidence and award has been passed exparte because the petitioner did not defend the suit. I am of the view that even if the defendants are absent the Nominee has to exercise sound judicial discretion and in any case even after the evidence when the nominee passes exparte judgment and the award should record reasons for the same and the perusal of the judgment and award passed by the Nominee in the present case does not satisfy the said requirements and therefore I am of the view that the award passed by the nominee can not be sustained more particularly when it is exparte order and the nominee has not dealt with all the aspects of the case.

8. Mr.K.D.Shah's contentions against the infirmities in the order passed by the tribunal as well as Nominee are required to be appreciated more particularly in view of the fact that it is the case of the petitioner that they have paid amount of Rs.4 lacs and the same is not given credit and in view of the fact for showing his

bonafides that the petitioner has shown his readiness and willingness to deposit a sum of Rs.1 lac and to bear the costs of the proceedings before the Nominee, Tribunal as well as before this court.

9. In view of the above, following directions would meet with the ends of justice:

(i) That the petitioner shall file undertaking before this court as under within a period of three weeks from today stating that he shall not transfer or alienate or induct any person in the mortgaged property until the suit is finally decided by the Ld.Nominee and shall further deposit a sum of Rs. 50,000/- within a period of six weeks from today and also a further sum of Rs.50,000/- within a period of six weeks thereafter with the respondent-Bank and such deposits shall be subject to the outcome of the suit which will be finally decided by the Ld.Nominee.

(ii) The petitioner shall also pay the costs which is actually borne by the bank towards the proceedings before the Ld.Nominee, Tribunal as well as before this court. The bank is at liberty to withdraw the amount of Rs.10,000/-which is deposited by the petitioner pursuant to the order dated 15.4.02 which was extended to 3.5.02. While appropriating the amount of costs the bank shall give the credit of Rs.10,000/- which will be withdrawn by the bank from this court.

(iii) The Ld.Nominee will take up the suit for re-trial afresh and shall decide the same in accordance with law within four months from the date on which it is reported by the Bank or the petitioner to the Ld.Nominee that the amount of Rs.1 lacs as directed above by this court is deposited by the petitioner with the bank.

(iv) It is made clear that if the undertaking as directed above is not filed or the payment by way of deposit of Rs.1 lac is not made or if the amount of costs as directed above is not paid the Bank will be at liberty to proceed for executionm of the judgment and award of the Nominee in accordance with law.

10. The petition shall stand allowed to the aforesaid extent and the rule is made absolute accordingly.

17.5.2002 (JAYANT PATEL,J)